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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 505

JACK W. JERNIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. App. 20-23) is reported at 411 F. 2d 471.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1969, and a petition for rehearing was denied on July 7, 1969. The petition for a writ of certiorari was filed on August 25, 1969, under an

extension granted by Mr. Justice Black. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence obtained by an Internal Revenue Agent from a taxpayer at his office during the course of a routine tax audit should have been suppressed because the warnings specified in *Miranda* v. *Arizona* were not given.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on charges that he willfully made and subscribed false and fraudulent corporate income tax returns for the calendar years 1960 and 1963, in violation of 26 U.S.C. 7206(1), and that he advised the preparation of false and fraudulent corporate income tax returns for the calendar years 1961 and 1962, in violation of 26 U.S.C. 7206(2). (I-R. 101, 152.)[1] Petitioner was acquitted of other charges, involving the alleged filing of false individual income tax returns. (I-R. 1-5, 100, 105-106, 151.)

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[1] "I-R." and "II-R." refer, respectively, to the printed "Appendix and Supplemental Appendix", in two volumes, filed in the court of appeals. The second volume ("II-R.") is paginated from pages 391 through 688, followed by pages 1 through 90. These latter pages contain a hearing on petitioner's motion to suppress evidence, held out of the jury's presence, including (II-R. 15-47) a voir dire examination of Agent Lexow.

At the trial, Internal Revenue Agent Lexow[2] testified that on June 18, 1964, he selected petitioner's 1962 return for a routine audit and, after making an appointment by telephone, went to see petitioner at his office at Marion Engineering Associates, a corporation of which petitioner was president. (I-R. 212-215; II-R. 15-16, 23.) He had told petitioner that he wanted to see petitioner's personal bank statements and his savings account passbook, and when Lexow arrived petitioner took his bank statements out of his desk. (I-R. 210.) Lexow introduced himself simply as Mr. Lexow of the Internal Revenue Service and at once began his examination of petitioner's bank deposits. (I-R. 213.) Petitioner was able to explain all the deposits except one for $1,500 and agreed that he would have that information, as well as his passbook, the following day. (I-R. 213-214.) On the following Monday, Lexow telephoned and petitioner stated that the $1,500 deposit was a loan to him from the corporation. (I-R. 214-215.)[3] During the same telephone conversation, Lexow referred to a check for $4,777.50 from Withlacoochee River Electric Co-operative and asked petitioner what it was for. Petitioner replied that it was for engineering services. When Lexow observed that it did not appear to be reported "in your annual return", petitioner replied that it was a loan. (I-R.

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[2] Lexow was an Internal Revenue Agent, not a Special Agent of the Intelligence Division. This is not disputed.

[3] Lexow's later examination indicated that this loan was treated properly on the books of the corporation. (I-R. 215-216.)

215.) Lexow asked to see how it was handled on the corporation's books, and petitioner agreed that Lexow could come to his office. (I-R. 215.) At his office, petitioner explained that it was for services performed by the corporation but was not recorded on the books of the corporation because he had borrowed the money from the corporation. (I-R. 216-217.) Petitioner showed Lexow a note to the corporation for the debt. (I-R. 217.) When Lexow asked whether there had been other similar transactions, petitioner stated that there had been and showed Lexow a number of promissory notes, of which Lexow made a list. (I-R. 218.)[4] Petitioner had copies of these notes made for Lexow. (I-R. 220.) He told Lexow that all the checks which he had cashed but not recorded were from Withlacoochee, payable to Marion Engineering Associates. Lexow asked if this was all the income that had not been reported by the corporation, and petitioner replied that it was. (I-R. 220-221.) When asked what he had done with the money, petitioner told Lexow "that he used it to get out of girl trouble". (I-R. 221.)

Lexow then asked if petitioner would give him a statement as to why the income had not been reported, and petitioner replied, "Will it hurt me if I

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[4] The notes were as follows (I-R. 218):

June 23, 1958	$3,500.00
November 11, 1959	3,500.00
April 1, 1960	3,840.00
April 2, 1961	4,500.00
March 22, 1962	4,500.00
August 30, 1962	4,777.50
January 1, 1964	4,500.00

don't have an attorney?" Lexow replied that "generally, it's to a person's benefit to be frank and honest". Petitioner still appeared unwilling to make a statement, but while Lexow was writing notes on his conversation with petitioner, petitioner changed his mind and said that he would like to make a statement. (I-R. 221-222.) Petitioner then wrote out and signed the following statement (Govt. Ex. 21; I-R. 222, 234):

> Answer to Mr. C. P. Lexow's question as to why I cashed MEA checks. I needed cash to help on serious sickness, and mostly to pay off women. I considered I owed MEA this money, and did not think they should pay tax on it till they got it.

On the following day, at petitioner's office, Lexow asked petitioner how he intended to pay the money back, and petitioner replied that he was hoping to "quit running with women" and planned to give himself a raise in salary. (I-R. 234-235.)

Subsequently, the matter was referred to the Intelligence Division, and on July 16, 1964, Lexow and Special Agent Lancaster went to see petitioner. (II-R. 42-48.)[5]

Lexow testified that he had not at any time given petitioner any of the warnings specified in *Miranda* v. *Arizona*, 384 U.S. 436. (I-R. 226-227; II-R. 23-24, 27-28, 35.) He testified that, when he obtained petitioner's written statement, he did not

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[5] Petitioner does not claim that any information was obtained from him by Special Agent Lancaster in violation of his constitutional rights. (Pet. 10-19.)

then know that petitioner would be charged with a criminal offense, or even whether petitioner would ultimately be charged with a deficiency or credited with a refund because of unclaimed deductions. (I-R. 232-233.) He also testified that, although he had information concerning the Withlacoochee check for $4,777.50 before he first visited petitioner, he did not know that the check was not included in petitioner's tax return. (II-R. 17-18, 27.)

The district court overruled petitioner's objection to the admission of his written statement (Govt. Ex. 21) and of Lexow's testimony concerning petitioner's oral statements (set forth above), observing that "There was no police atmosphere here" (II-R. 54). In its charge, the court instructed the jury to disregard the evidence of statements made by petitioner unless they were convinced beyond a reasonable doubt that they were made voluntarily and understandingly. (II-R. 76.)

ARGUMENT

1. The undisputed facts show that, when petitioner gave the statements which he attempted to have suppressed at his trial, he was not under arrest or in custody, or subjected to a coercive atmosphere. He was interviewed at his own office by prior appointment, and his freedom of action was not restrained in any way. His decision to reveal his nonreporting of corporate income, accompanied by the explanation (I-R. 234) that he borrowed the money from the corporation and felt that it should not be obliged to report it as income until he repaid the loans, was

obviously entirely voluntary. This case is, therefore, completely distinguishable from *Miranda* v. *Arizona*, 384 U.S. 436, and *Mathis* v. *United States*, 391 U.S. 1, which applied the *Miranda* rules to a criminal tax case in which the defendant had given incriminating statements and information to a Revenue Agent while serving a prison sentence for a state offense. This Court has repeatedly declined to review decisions holding that *Miranda* warnings are not required in ordinary tax investigations (*Mathis* involved the exceptional circumstance of incarceration), and no reason appears for reaching a different result here. See, *e.g.*, *Taglianetti* v. *United States*, 398 F. 2d 558, 566 (C.A. 1), affirmed, 394 U.S. 316; *United States* v. *Mackiewicz*, 401 F. 2d 219, 223 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso*, 378 F. 2d 612, 619, modified, 387 F. 2d 376 (C.A. 4), certiorari denied, 390 U.S. 955; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975; *United States* v. *Maius*, 378 F. 2d 716, 718-719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States*, 405 F. 2d 34, 40 (C.A. 8), certiorari denied, 394 U.S. 943; *Selinger* v. *Bigler*, 377 F. 2d 542 (C.A. 9), certiorari denied, 389 U.S. 904. See also *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), pending on petition for a writ of certiorari, No. 163, October Term, 1969; *Spahr* v. *United States*, 409 F. 2d 1303 (C.A. 9), pending on petition for certiorari, No. 366, October Term, 1969.

2. There is no conflict of authority in the courts of appeals on the issue raised in this case. Petition-

er's strongest support in the appellate decisions is found in two recent cases in which the Seventh Circuit, contrary to all of the decisions of the other courts of appeals, held that *Miranda* warnings must be given *after* (but not before) an investigation has been referred to the Intelligence Division of the Internal Revenue Service. *United States* v. *Dickerson*, No. 17349, decided July 28, 1969, 69-2 U.S.T.C., par. 9556; *United States* v. *Habig*, No. 17409, decided July 28, 1969, 69-2 U.S.T.C., par. 9557; *cf. United States* v. *Lackey*, No. 17310, decided July 16, 1969, 69-2 U.S.T.C., par. 9532. Even according to the holdings in these cases, no warnings were required here, since the evidence was obtained by a regular agent (not by a special agent) at the outset of his investigation and before any referral to the Intelligence Division.[6]

3. Aside from any question of *Miranda* warnings, petitioner makes the assertion that he was deceived by Agent Lexow. (Pet. 17.) If, by deceit, petitioner means that he assumed (Pet. 11) that the investigation was concerned only with civil tax liabilities and that there was no possibility of criminal proceedings, the record shows that Agent Lexow never gave any such assurance (nor did petitioner testify that he had any such belief, since he failed to testify at all). The theory that an ordinary taxpayer, when ques-

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[6] The same line of demarcation was applied in *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.), on which petitioner relies (Pet. 11), with the result that *Turzynski* is also inapplicable here. The same is true of *United States* v. *Wainwright*, 284 F. Supp. 129 (Colo.), also cited by petitioner (Pet. 12).

tioned by revenue agents of any kind, is unaware of the possibility that criminal prosecution could result from findings of fraudulent conduct, was long ago effectively repudiated in *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C.A. 2), certiorari denied, 360 U.S. 918, where the court observed that, absent any contrary assurance, an ordinary taxpayer is under no illusion that civil liability is the only possible consequence of an Internal Revenue Service investigation. See also, *Turner* v. *United States*, 222 F. 2d 926, 931-932 (C.A. 4), certiorari denied, 350 U.S. 831. Petitioner, who was president of an engineering corporation, showed an awareness of potential danger when, before giving a written statement (I-R. 234), he raised the question of whether he should do so without consulting an attorney (I-R. 222). Agent Lexow's reply, that frankness and honesty were generally to a person's benefit (I-R. 222), was not the equivalent of a guarantee against prosecution, and Lexow could not then know whether criminal charges would ever be brought. Petitioner, who in any event had already revealed the essential facts, then decided to go ahead and sign a statement without consulting an attorney. (I-R. 222.) In short, the allegation of deceit is not borne out by the record, and the case is not distinguishable from other recent cases where similar allegations of deceit were rejected and this Court denied certiorari. See *e.g.*, *Muse* v. *United States*, 405 F. 2d 40 (C.A. 8), certiorari denied, 393 U.S. 1117. *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943. *Cf. Frazier* v. *Cupp*, 394 U.S. 731, 737, 739.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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